

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

COVANTA BRISTOL, INC.

and

Cases 34—CA—12339
34—CA—12378

LUIS MOTA, An Individual

*Thomas E. Quigley, Esq., for the General Counsel.
Raymond J. Carey, Esq., of Foley & Lardner LLP,
for the Respondent.*

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Hartford, Connecticut, on November 3 and 4, 2009. Luis Mota, an Individual, filed the charge in Case No. 34-CA-12339 on May 6, 2009 and a complaint issued on July 31, 2009 alleging that Covanta Bristol, Inc., the Respondent, discharged him in violation of Sections 8(a)(1) and (3) of the Act on April 29, 2009.¹ On June 24, Mota filed the charge in Case No. 34-CA-12378 and a complaint issued in that case on August 24, alleging that the Respondent violated Section 8(a)(1) of the Act on April 1 by threatening employees with unspecified reprisals for engaging in union and other protected concerted activity. The cases were consolidated for hearing by order dated August 24.

The Respondent filed answers to the complaints on August 13 and September 4, respectively, denying the commission of any unfair labor practices and asserting, inter alia, that Mota was, at all times, an “at will” employee, that the Respondent had cause for termination and that any statements by supervisors were protected by Section 8(c) of the Act.

As framed by the pleadings, the issues presented in this case are: (1) whether the Respondent terminated Mota during his probationary period because he had made safety complaints, thereby invoking rights under a collective bargaining agreement between the Respondent and the union representing its employees and/or because he supported the union and its steward, Kerry Hils; and (2) whether statements made by the Respondent’s Facility Manager Leon Plumer during a grievance meeting on April 1 constituted a threat of unspecified reprisals in violation of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

¹ All dates are in 2009 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

5 The Respondent, a corporation, operates a waste-to-energy processing plant at its facility in Bristol, Connecticut, where it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 30, International Union of Operating Engineers, the Union involved in this proceeding, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

15 The Respondent is part of Covanta Energy, a corporation involved nationwide in the process of converting municipal waste to energy. The facility in Bristol, Connecticut involved in this proceeding is one of several in that state but the only one with a union representing its employees. Local 30, the Union, represents about 20 employees in the operations and maintenance department. Kerry Hils, an electrician employed by the Respondent for 18 years, is
20 the Union's chief steward. Plumer, the Facility Manager, is the Respondent's highest ranking officer at the facility. Dana Andrews, the Chief Engineer, and Scott Gerrard, the Safety Coordinator, report directly to him. The Respondent has admitted that Plumer, Andrews and Gerrard are statutory supervisors and its agents.

25 At this and other similar facilities, waste is hauled to the facility from surrounding municipalities and dumped into large boilers. The waste is then combusted to generate steam which powers turbines creating electricity that is returned to the local power grid. This process creates ash and other debris that collects on the sides and tubing within the boilers. The Respondent shuts down its two boilers at the facility twice a year to perform a thorough cleaning
30 and maintenance operation. The Respondent's regular employees customarily work 12-hour days during these shutdowns. In order to accomplish this work in as short a time as possible, the Respondent will also hire temporary employees to supplement its regular crew.

35 As noted above, the Respondent's operations and maintenance employees are represented by Local 30. The collective bargaining agreement in effect at the time involved here was effective for the period May 1, 2006 through April 30, 2009. The collective bargaining agreement contained, at Article 34, the following provision regarding health and safety:

40 The Company shall maintain safe, sanitary and healthful conditions and shall provide first aid equipment to take care of employees in case of accident or illness. The Company and the Union shall cooperate to promote employee safety and accident prevention in and around all operations and premises.

45 It shall be the responsibility of each employee to maintain his place of work in a clean and orderly condition. Employees shall be required to observe safety rules and regulations established by the Company, including the use of prescribed safety equipment or clothing. Employees are to report any safety or health problem to the company whenever such a problem is observed.

50 As a condition of employment all employees shall be required to conform to all reasonable work rules and regulations that may be issued by the Company from time to time pertaining to the operations, health and safety. Before implementation of work rules the Company shall provide notice to the Union.

Under this provision, a joint labor/management health and safety committee was established to meet regularly and review operation, accidents and injuries, etc.

As part of its safety program, the Respondent utilized a form known as a "Facility Near Miss/Communication Report" which employees were expected to use to report any accidents or safety issues they observed. The Respondent's witnesses testified that the Respondent encouraged employees to file such reports, rewarding those who did, and using the reports as a basis for discussion at regular safety meetings. In fact, the Respondent expects its hourly and/or management employees to submit a *minimum* of five near miss reports a week. The Respondent also offered evidence showing that hundreds of such reports are filed annually. Mota and Hils, the chief steward, acknowledged that this is the Respondent's stated policy and practice. The General Counsel offered no evidence, other than that related to Mota, to establish that the Respondent had ever disciplined an employee for filing a near miss/communication report.

Mota, the Charging Party, was hired by the Respondent after being referred by Chief Steward Hils and interviewed by the Respondent's Chief Engineer Andrews. Although Mota had ten years experience as a diesel mechanic, he had never worked in a power plant before and had no experience in the waste-to-energy operation performed at this facility. His first day of employment was March 16. There is no dispute that, as a new employee, Mota was subject to a probationary period. Article 23 of the collective bargaining agreement establishes the probationary period:

Newly hired employees shall be on probation for the first sixty (60) work days of employment. During this period, employees shall receive the rates of pay provided herein, but shall not be entitled to any other benefits under this Agreement. During the probationary period, the Company may discipline or discharge any employee for any reason without recourse to the grievance procedure. Upon completion of the probationary period benefits shall be paid back to date of hire.

Mota also signed a document on his first day that acknowledged that he was on probation for 60 working days and explained, in detail, what that meant:

...During this time, your supervisor as well as the Facility Manager will monitor and evaluate how well you perform your job assignments and meet the overall requirements of your position on the plant staff.

Each employee will be fairly evaluated, promptly informed of less than satisfactory performance and given an opportunity to correct any problem areas. However, the employee may be discharged at any time during the Probationary Period if the Facility Manager determines that the employee cannot adjust to the job requirements, has furnished incorrect or false information in his application or for any reason cannot properly perform the job in a safe manner.

Mota was hired as a utility operator, an entry-level laborer position. Because of his mechanical experience, however, he was assigned additional duties involving inspection and maintenance of company vehicles.

The second week of Mota's employment coincided with one of the Respondent semi-annual plant shutdowns for cleaning and maintenance of the boilers. Sometime between 4:00 and 4:30 pm on March 23, the first day of the shutdown, an accident occurred which resulted in

a head injury to Sean Ryan, the employee with whom Mota was working that day. Although the facts as to how the accident occurred and who was at fault are in dispute, it is not necessary to resolve those issues to render a decision in this matter.

As part of the cleaning process, the Respondent conducts blasting inside the boilers to loosen ash that has hardened and become attached to the walls and tubes. Employees and temporary help will then remove the ash and other debris that collects at the bottom of the boiler. In addition, employees are required to build scaffolding inside the boiler to allow employees to reach upper levels for maintenance and cleaning. Ryan, Mota and Joe Carroll, another of the Respondent's employees, were working on a crew with several temporary laborers that day. Blasting had occurred throughout the day and another blast was scheduled for 4:00 pm. According to Ryan and Mota, after taking a break, they were assigned to enter the boiler to begin building a "dance floor", i.e. the foundation upon which scaffolding is built, inside the convection room hopper. Carroll was assigned to be the "hole watch" or lookout at the entry, a requirement whenever employees are working in confined spaces. Another requirement for such work is that a confined space permit has to be issued by the control room operator and posted by the entry before an employee can enter. The permit ensures that the space has been checked and it is safe to enter. The shift supervisors on duty at the time were Mike Pastore and Shane Soulia, who were working at a level above where Ryan and Mota were assigned.

Ryan testified that, while in the break room, Gerrard, the safety coordinator, told him and his crew to "get going" after the 4:00 pm blast, that "they were ready." Gerrard disputes Ryan's testimony, claiming that he did not know who assigned Ryan's crew to enter the hopper at that time. There is no dispute that at the time Ryan and his crew began entering the hopper, there was no confined spaces permit posted at the door. According to Ryan, he spoke to the control room operator on duty, Mike Tallon, who told him that "the holes were sniffed" and he was on his way with the permit. Mota testified that Ryan relayed Tallon's statement to him. Tallon did not testify and, although the Respondent's witnesses claimed that Tallon was interviewed as part of its investigation of the accident and disputed Ryan's version of their conversation, no written statement from him was offered into evidence.

There is no dispute that, notwithstanding the absence of a permit at the door to the convection room hopper, Ryan and his crew began to enter to lay the planks needed to build the dance floor. The door is only 2' x 2'. As Ryan entered, he looked up and was hit in the head by a chunk of hardened ash that fell from above. He was momentarily knocked unconscious and was bleeding from a head wound when he was removed from the hopper. Mota was immediately behind Ryan when he poked his head through the door and assisted him after the accident. There is no dispute that Gerrard, who was called to the scene, took Ryan to an occupational injury clinic frequented by the Respondent rather than to a hospital emergency room. Gerrard and Ryan arrived as the clinic was about to close for the day. The doctor who greeted them looked at Ryan's injury and called for an ambulance. At Ryan's request, the ambulance took him to Waterbury Hospital, near his home, rather than the hospital closest to the Respondent's facility and the clinic. These facts are undisputed. Ryan was out of work the following day and returned on March 25. In the meantime, the Respondent had initiated an investigation of the accident and Mota, as an eyewitness, was interviewed on March 24.

With respect to the March 23 accident, Mota testified that, after Gerrard took Ryan away, Tallon, the control room operator, arrived at the hopper and asked if the accident occurred before or after the permit had arrived. Mota confirmed that they entered the hopper before the permit was posted. According to Mota, he then retrieved another confined spaces permit that was posted by the "barn door", another entry point below the hopper and posted it at the convection zone hopper. Mota testified that, at the time, he believed that "any permit was better

than no permit.” Mota also testified that he was unaware of the proper procedures at the time. He signed the barn door permit and had another employee, Rick Cassese also sign it, before posting it at the convection zone hopper. Cassese was not identified as being part of the crew with Ryan and Carroll. Mota did not explain why he chose to have Cassese sign the permit.

5 On March 24, Facility Manager Plumer asked Mota to provide a written statement regarding what happened. Mota wrote his statement in Plumer’s office with Hils present. The statement, which is in evidence, merely recites what happened when Ryan poked his head through the door to check out the hopper before the crew began its assigned task. He did not mention moving the barn door permit to the convection hopper. The next day, March 25, Plumer again interviewed Mota. Plumer testified that Mota told him “there should have been more direction and supervision during the entire build-up to the accident.” Plumer recalled that Mota also complained that there should have been a contingency plan in place and someone responsible for the job to make a decision how to proceed. Plumer acknowledged interpreting Mota’s remarks as suggesting that getting the job done quickly was more important to the Respondent than getting the job done safely. Ryan also provided a written statement to Plumer on March 25.²

20 About a week later, on March 31, Gerrard asked Mota to give another statement. Gerrard was responsible for completing the accident investigation and apparently was under a time constraint. According to Mota, Gerrard asked him what he had seen and, as Mota responded, Gerrard typed the statement on his computer. Later that day, Mota asked Gerrard if Hils, the union steward should see the statement before Mota signed it. When Gerrard told him, “no”, Mota signed the statement. When Mota reported this to Hils, Hils told him to go back and ask Gerrard for a copy of the statement. Mota did as Hils instructed. Although Gerrard initially said he would get Mota a copy of the statement, he did not do so. Instead, about 10 minutes later, Chief Engineer Andrews called Mota to his office. Gerrard was also present. Andrews asked if Mota had asked Gerrard for a copy of his statement. When Mota confirmed that he had, Andrews asked, with a stern look, “Why do you want a copy of it?” When Mota replied that he wanted a copy because his name was on it, Andrews asked if Mota had any ulterior motive for wanting a copy. Mota said he did not, he just wanted it because it had his name on it. Andrews told Mota that he would have to get a copy from Plumer who was already gone for the day. Mota’s testimony regarding this conversation was uncontradicted.

35 The same day, Gerrard also asked Ryan to give another statement. When Gerrard asked Ryan to sign the statement he had prepared based on Ryan’s answers to his questions, Ryan told Gerrard that he wanted the steward, Hils, to see it first. Ryan left Gerrard’s office to get Hils. When Hils arrived at Gerrard’s office and read the statement Gerrard prepared, he protested that this statement made it look like the accident was all Ryan’s fault. He instructed Ryan not to sign the statement and asked Gerrard for a copy of the statement so he could show it to the Union’s Business Agent, Tony Calendrino. According to Hils and Ryan, Gerrard became upset when Ryan refused to sign the statement. Gerrard complained that he wasn’t feeling well, had a bad month and just wanted to finish the report. Hils then complained about how the Gerrard had handled the injury to Ryan, i.e. not calling an ambulance and taking him to the clinic instead. The conversation escalated with Hils and Gerrard both becoming agitated to the point that Gerrard began throwing chairs around the room. At one point, while Hils was out of the room retrieving a copy of the statement from a printer down the hall, Gerrard told Ryan, “I’m sick of that f---ing asshole.”

² Ryan’s March 25 statement is not in evidence.

Also on March 31, according to Mota, he filled out his first “near miss/communication report” based on an incident that occurred while working with Cassese. Mota testified that he was working with Cassese at the A-3 bag house when Cassese instructed him to enter a confined space even though there was no permit posted. On the near miss report, Mota described the incident as follows:

While working on unit A-3 baghouse, I was told to enter a confined space to start removing bags. There was no confined space entry permit on site or even drawn at that point. Again this was a “we have to get this done” situation, and we have experienced employees not following protocol, making learning protocol that much harder for newer employees.

In the section calling for a recommendation for corrective action, Mota wrote: “We need to follow protocol. We just went through this with an injured employee as a result.” Although Mota dated the report March 31, he admittedly did not submit it until the next day, April 1, under circumstances to be described next.

On April 1, Mota was called to Plumer’s office again and questioned about the March 23 accident. Chief Engineer Andrews and Mota’s immediate supervisor, Richard Moll, were also present. There is no dispute that Plumer told Mota that the Respondent had found “inconsistencies” in the reports Plumer had received regarding the incident. He showed Mota a copy of the barn door permit that Mota had transferred to the convection hopper. Mota admitted making a mistake by moving the permit and explained why he had done so. Plumer thanked Mota for his “honesty” and instructed him to go with Andrews to his office so Andrews could express the importance of honesty at Covanta. In his testimony, Plumer acknowledged that he thanked Mota for being honest and confirmed that he believed Mota’s conduct in this regard was due to lack of knowledge and experience.

It was en route to Andrew’s office that Mota decided to submit the near miss report he had prepared the day before. According to Mota, Andrews told him, in the office, that it was good that Plumer believed him, that if Plumer thought Mota had been lying, he would not have a job anymore. Mota testified that Andrews also discussed with him some upcoming job opportunities at the plant for which Mota might be considered. At some point during the meeting, Mota handed Andrews the near miss report. After reading the report, Andrews asked who had ordered Mota into the hole. Mota told Andrews it was Cassese. Andrews told Mota not to take direction from Cassese, but only from a shift supervisor. According to Mota, Andrews told him he had done the right thing insisting on a permit before entering a confined space. This is also noted in the supervisor’s response section of Mota’s near miss report. Andrews did not dispute most of Mota’s testimony regarding this meeting. He did deny discussing any promotional opportunities with Mota. Andrews also claimed that he told Mota that it was unfortunate he had started “in a hole in this facility” and that he would have to gain the trust and respect of supervisors and prove himself if he wanted to make it through his probationary period. This last testimony was disputed by Mota.

Ryan was also called into Plumer’s office on April 1. Also present were Andrews, Moll and the Union’s steward, Hils. Plumer told Ryan that there were inconsistencies in the reports regarding the accident, that Tallon disputed Ryan’s claim about the permit and that Gerrard denied telling Ryan to start work after the 4:00 blast. Plumer accused Ryan of making “false statements.” There is no dispute that Hils was not happy with the Respondent attempting to blame Ryan for the accident. Hils responded by criticizing management’s role in the events of March 23, including the presence of the two supervisors in the boiler above Ryan’s crew, knocking down ash while employees were supposed to be working below. He also chastised

management for not calling for an ambulance to take Ryan directly to the hospital. There is no dispute that Hils used colorful language in making his criticism, telling Plumer he had to get control over his supervisors. According to Andrews, what Hils told Plumer was that he had to “get his head out of his ass” and take the reins of management.

At some point in the meeting, Plumer brought up the meeting the day before in Gerrard’s office, accusing Hils of trying to intimidate Gerrard. This made Hils angry and he admitted telling Plumer to stop wiping the asses of his supervisors. Andrews spoke up and said he had enough and “didn’t have to listen to this shit”. As Andrews started to leave, Plumer stood up, said “enough!”, slapped the table and shouted at Hils: “You want to see intimidation? I’ll show you intimidation.” Hils asked Plumer to calm down. As a result of this meeting, Ryan was suspended indefinitely for failing to be truthful in the investigation and Hils was suspended for “holding up the investigation.” Plumer did not contradict this testimony. Andrews, whose memory was good in other respects, claimed he could not recall anything else Plumer said after he slammed the desk and said “enough.”

Following the April 1 meetings, Hils prepared and filed four grievances, two regarding the suspensions he and Ryan had received and two regarding Mota. The Mota grievances challenged the Respondent having interviewed Mota without representation. There is no dispute that the grievances were not filed until a meeting on April 7 that involved the Union’s Business agent, Calendrino, and a regional Human Resources representative for Covanta, Dave Anechiarico. All the usual suspects were also there, including Mota who was paged to come to the meeting about a half hour after it started. Hils testified that, after submitting the grievances to the Respondent’s representatives at the meeting, the parties discussed the March 23 accident. According to Hils, the Respondent was still attempting to blame Ryan for the accident. Ryan responded by telling the Respondent’s officials, “everyone knows in that shop that I didn’t jump off that chair from the lunchroom and start a job on my own.” Hils voiced his anger at the Respondent’s attempt to shift the blame rather than taking responsibility for what he believed was poor supervision of the job. He specifically asked why the two supervisors on duty, Pastore and Soulia, were not being held accountable. It was during the discussion of the accident that Mota was called to the meeting.

After reviewing the accident, John Walker, a Regional Vice President for the Respondent, said it was clear they needed to review the permit process at the facility. The parties then shifted focus to the events of March 31 and April 1, i.e. Hils conduct at the meeting with Gerrard and Plumer’s alleged threat the following day. Hils testified that he re-enacted Plumer’s “I’ll show you intimidation” outburst and asked Andrews and Moll, who had been at the April 1 meeting, if that was how it went. According to Hils, Andrews replied, “Yep, that’s about right.” This testimony was corroborated by Mota and Ryan. None of the Respondent’s witnesses who were at this meeting were asked any questions about it by the Respondent’s counsel. The testimony of General Counsel’s witnesses is thus uncontradicted.

There was also a discussion of the four grievances filed by the Union that day. As a result of these discussions, the Respondent rescinded the suspensions of Ryan and Hils and returned them to work with full pay for the time lost. With respect to the grievances filed on behalf of Mota, Andrews questioned whether Mota, as a probationary employees, was entitled to union representation. The Union’s Business Agent, Calendrino, argued that, although he was not yet a member of the unit, he was entitled to representation during the investigation. Mota testified that, after hearing Andrews question his right to representation, he spoke up, saying, “[w]ait a minute, hold on here folks, I’m not the guy that got hurt and I’m not the guy that hurt

him, and what Dana just said scared the crap out of me..." No one responded to Mota's comment.³

On April 16, Mota filed his second near miss/communication report for an incident that occurred the previous day. Mota was again working with Cassese.⁴ Mota testified that Cassese was trying to untangle some gantry hook chains three stories in the air, without any fall protection. According to Mota, Cassese actions created an air leak that Mota had to repair. Mota testified that he also noticed that a coworker had placed two of four heavy locks upside down on a bag house cover. That same day, according to Mota, he observed that Cassese had installed some bags in the bag house improperly. Despite all these problems Mota observed on April 15, his near miss only addresses the upside down gantry hooks. Specifically, Mota wrote, regarding the near miss:

Gantry chain hooks were attached to the Bag House cover upside down. Two hooks were attached correctly and two were upside down. The hooks being upside down can over-stress the hooks causing them to snap. This would be ugly.

More attention to detail has to happen.

The Near Miss report shows that Gerrard, Andrews and Plumer all reviewed it. In the Supervisor's response section, Gerrard wrote: "will discuss with day shift personnel what is proper hook placement." Nothing in the report submitted by Mota identifies Cassese as the employee responsible for the hooks being upside down and there is no evidence that Mota ever told Gerrard, Andrews or any other supervisor that Cassese was responsible.

There is no dispute that Mota continued to work at the facility until April 29 without any supervisor or representative of management criticizing his work, warning him that his performance was not up to par, or otherwise indicating that his job was in jeopardy. On April 29, without any warning, Mota was called into Plumer's office and terminated. Andrews, Chip Robertson, one of the Respondent's supervisors, and alternate steward Mark Sausanovitch were present with Plumer and Mota for this meeting. Conveniently, Hils was off that day, his first day off since his return from suspension.

Plumer told Mota that he was 45 days into his 60-day probationary period and that they had decided to terminate him. Mota asked supervisor Robertson if there was anything he had been asked to do that he had not done, or had done wrong. Robertson replied that Mota had not done anything wrong. Andrews told Mota, "we just decided that you are not a good fit." Mota signed a form acknowledging his termination. The form contains no specific reason for termination. Andrews admitted that, despite several request from Mota for an explanation why he was being terminated, none of the Respondent's representatives at the meeting gave him one.

The record contains evidence of only one employee in the previous five years who was terminated during probation, Jason McCauley. The only record regarding this employee that

³ Although Hils recalled the discussion between Calendrino and Andrews regarding Mota's right to representation, he did not recall Mota's statement.

⁴ There was some testimony from General Counsel's witnesses that Cassese was a problem employee, frequently causing accidents and damage to equipment or property. According to these witnesses, he had acquired the nickname in the shop of "Ricky Wreck It." Respondent's witnesses acknowledged that Cassese had this reputation.

was produced by the Respondent was a termination letter, dated July 14, 2004, which stated that McCauley was terminated “for failure to follow direction during your probationary period.” There are no records nor other evidence indicating how long McCauley worked before he was terminated.

5 Plumer testified that, as the facility manager, he made the decision to terminate Mota. However, in doing so, he relied exclusively on a memo prepared by Chief Engineer Andrews recommending the termination. Andrews testified regarding the circumstances and reasons for Mota’s termination. According to Andrews, he e-mailed several supervisors in mid-April seeking
10 input regarding how Mota was doing. Specifically, he solicited input from Safety Coordinator Gerrard and shift supervisors Pastore, Soulia, Sam Logsdon, and Robertson. He compiled their responses in an undated memo he sent to Plumer. In the memo, Andrews reported receiving the following response from Logsdon:

15 I think it might be best if we get rid of Lou as soon as we can. I feel he is a troublemaker. If you look at the Near misses he fills out, they seem to be written in the hopes of getting Rick in trouble. I just don’t trust him.

Andrews admitted that Logsdon did not directly supervise Mota. Logsdon was not called as a witness in this proceeding. As noted above, neither of the near miss reports submitted by Mota
20 name Cassese.

Andrews, in his memo to Plumer, reported receiving the following input from Soulia, who was one of the supervisors on duty at the time of the March 23 accident:

25 I don’t really have specific details but I don’t really have a good feeling with this one. I think in the long run it might not be good.

The response Andrews received from Gerrard, as reported in the memo, was more detailed and specific. Gerrard responded as follows:

30 In my opinion he has to go and here are the reasons why:

1. He has the I know it all attitude. You do not start a new job with the attitude that you know everything after the first week.
2. As I was explaining how to bring up bag house cages with the simon he was
35 trying to tell me that I was not doing it correctly.
3. The near miss he put in regarding the removal of bags from a hopper was aimed to point blame on a fellow worker.
4. It has been noticed that it appears that all of a sudden he has a problem with a fellow employee.
- 40 5. On the 15th of April there were 2 incidents regarding his displeasure of a fellow employee, the first was Rick stayed on the bag house during lunch and finished the installation of the bags. He made it a point to inform me that the seams were not exactly 180° from the damper. Just before that myself and Chip looked into the baghouse and we both agreed it was fine. The
45 second was when he was asked if he wanted to stay overtime he said he would if Dallas was. He mentioned nothing if Rick was staying.

Gerrard testified at the hearing to explain the points he made to Andrews. In doing so, as pointed out by the General Counsel in his brief, Gerrard contradicted himself and embellished
50 his testimony with additional criticisms not previously mentioned.

Robertson gave Andrews the following input, as reported in Andrews undated memo to Plumer:

I have not had much interaction with Lou, however, the times that I have are questionable at best. There are four specific instances that I should inform you about to justify my position.

1. There was a near miss submitted pertaining to working within a confined space. The near miss was written for A-2 and in fact it dealt with B-2. There was a permit issued for B-2 that space, just in a temporary closed status. If he did ask the question then that would have been not an issue.
2. Scott Gerrard called on April 1, 2009, inquiring about his status on staying to crush cages from the overhauls. I was not sure of the status of the cage demo, but did inform Scott that Lou was on site. The task assigned was not accomplished, but rather assisted with a LOTO of another baghouse. Granted that was a good training exercise, but not informing the current supervisor on shift, Mike Pastore, the expected assignment lent a degree of being misleading.
3. On April 15, 2009, upon securing the lid on B-9 baghouse for the day, he was informed that the lid was not seated completely and was directed to completely seat the lid. At the time I could see from the control room the gap left, I was relieving the CRO at the time. Rick Cassese inspected the lid and reseated as Lou watched.

There was one other specific instance, but it escapes my "grey matter" at this time, but somewhat minor. With just the specific instances listed above, he demonstrates a degree of all knowing, bordering on arrogance, and less that a team player. I feel retention would not be in the best interest of the Bristol facility.

Robertson testified at the hearing. As with Gerrard, his testimony was not always consistent with what is reported in Andrews' memo. He also sought to embellish his criticisms of Mota by adding things not previously reported. Moreover, on cross-examination, he was forced to admit that he was totally mistaken regarding the confined space near miss Mota had submitted on April 1. His mistake about this incident is probably attributed to the fact that Robertson was working on a different shift than Mota, had very little contact with him and only second-hand knowledge about the incident.

Finally, Pastore's input, as reported by Andrews, was the following;

I am sure he has the ability to do a fine job but I am not sure at what the price tag is on that ability. I did spend some time with him during the outage showing him around and I think he will be a quick study. However, in the role we shared over the outage it is difficult to get a feel for the guy.

Pastore did not testify.

On April 22, Andrews wrote another memo to Plumer specifically recommending Mota's termination. After quoting the collective bargaining agreement provision governing probationary employees, Andrews wrote as follows:

My question is does he get Union representation or not? We should look into this since Tony said he is entitled, but I am not just going to take his word for it.

Plumer was not even asked about the incident and Andrews recalled Plumer saying “enough” but could not recall what else he said. The other supervisor at the meeting, Moll, did not testify. I credit Hils and Ryan and find that the statement was made as they described. As noted, their testimony was essentially uncontradicted. In addition, during the April 7 meeting, when Hils asked Andrews if this is what happened, he confirmed Hils version of the outburst. Finally, I agree with the General Counsel that Hils and Ryan, as current employees of Respondent testifying against their employer’s interest, are particularly reliable. See *Flexsteel Industries*, 316 NLRB 745 (1995).

Having found that Plumer in fact said, during the April 1 meeting, “I’ll show you intimidation”, does not end the inquiry. The Respondent argues that even if the statement was made, it was not unlawful because Hils had lost the protection of the Act by his profane, abusive and insubordinate conduct at the meeting. See *Verizon Wireless*, 349 NLRB 640, 646 (2007); *Atlantic Steel*, 245 NLRB 814, 816 (1979). There is no dispute that the meeting became “heated” and that Hils in fact made some insulting remarks to Plumer regarding his support of the supervisors at the plant. In addition, Plumer called the meeting to address what he perceived to have been Hils attempt to intimidate Gerrard the day before during Gerrard’s meeting with Ryan.⁶ The Board has historically given some leeway to union stewards when they are zealously representing the interests of the unit employees and has found what might be considered offensive remarks in other settings to be permissible in the context of a grievance meeting or other similar setting. *Dreis & Krumpf Mfg.*, 221 NLRB 309, 315 (1975), *enfd.* 544 F.2d 320 (7th Cir. 1976).

In *Atlantic Steel*, *supra*, the Board identified four factors to consider in assessing employee behavior under these circumstances: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practices. Having considered these factors, I find that Hils’ “outburst”, under either version of the meeting, did not cross the line into unprotected conduct. I note that his allegedly profane and abusive behavior occurred in a meeting with the Respondent’s supervisors and only one other employee present, not in an open work area where he could be overheard by employees. Secondly, his conduct was in response to the Respondent’s shameful effort to make Ryan the scapegoat for its own failures in adequately supervising the work on March 23. Hils was also protesting the shoddy treatment accorded Ryan immediately after the accident when no ambulance was called and he was taken instead to an occupational injury clinic about to close for the day. Thus his “outburst” was directly related to protected concerted activity. The language used by Hils, while impolite, certainly was not outside the norm of shop talk at the facility. Finally, while not provoked by any unfair labor practice committed by the Respondent, Hils conduct was provoked by the Respondent’s shameful handling of the accident and its aftermath. I conclude that Plumer’s statement cannot be excused by any alleged inappropriate conduct by Hils.

I also note that, even assuming Hils had lost the protection of the Act, Ryan certainly had not. Ryan engaged in no inappropriate behavior during the meeting yet was forced to witness the facility manager, the highest ranking official at the plant, threaten the union steward that he would “show him intimidation.” Such a statement would clearly have a tendency to interfere with, restrain and coerce an employee like Ryan in the exercise of his right to protest unsafe working conditions or otherwise engage in protected activities. Accordingly, I find, as alleged in the

⁶ I note that the testimony that Gerrard had also become agitated on March 31 and threw some chairs around was not disputed. Thus, it is unclear who was trying to intimidate whom at that meeting.

complaint, that the Respondent violated Section 8(a)(1) of the Act through Plumer's April 1 conduct.

2. Mota's Termination

5 The complaint in Case No. 34-CA-12339 alleges that the Respondent terminated Mota, in violation of Section 8(a)(1) because he engaged in protected concerted activities by filing the near miss reports on April 1 and 16 and, in violation of Section 8(a)(3), because he assisted the Union. The General Counsel argues that the filing of the near miss reports constituted protected concerted activity because they raised safety concerns affecting employees generally, and because they
10 invoked the health and safety provisions of the collective bargaining agreement. The Board has held that an employee who raises safety issues with his employer is engaged in concerted activity that is protected by Section 7 of the Act. *Talsol Corp.*, 317 NLRB 290, 316-317 (1995). See also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Daniel Construction Co.*, 277 NLRB 795 (1987). It is also well-established that an employee's "reasonable and honest invocation of a right provided for in
15 his collective bargaining agreement" constitutes protected concerted activity, even when the employee acts alone. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Here, the collective bargaining agreement between the Respondent and Local 30 contained at Article 34 a provision requiring the Respondent to "maintain safe, sanitary and healthful conditions."

20 The Respondent argues that General Counsel has failed to prove either that Mota was engaged in any union or other concerted activity protected by the Act or that such activity motivated the Respondent's decision to terminate him. The Respondent relies on its right under the collective bargaining agreement to terminate a probationary employee like Mota for any reason or no reason, while acknowledging that even a probationary employee may not be terminated for discriminatory
25 reasons. The Respondent also argues that General Counsel has not met his burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 622 F.2d 899 (1st Cir. 1980), *cert. denied* 455 U.S. 988 (1982).

The Board has applied the *Wright Line* analysis in all cases that turn on employer motivation, such as this case. Under that analysis, the General Counsel must first prove, by a preponderance of
30 the evidence, that employee conduct protected by the Act was a motivating factor in the employer's decision to terminate an employee. To meet his burden, the General Counsel must offer evidence showing that the employee engaged in protected activity, that the employer was aware of the activity, that the employer had animus against the activity and that there was a causal connection between the activity and the termination. Because direct proof of unlawful motivation is seldom
35 available, the Board will rely on circumstantial evidence, such as shifting reasons for a termination, disparate treatment, timing, etc., to prove the elements of General Counsel's case. Once the General Counsel has met his burden, the Respondent must come forward with evidence sufficient to show that it would have terminated the employee for the reasons asserted even in the absence of protected activity. *Id.*

40 There is no dispute that Respondent was aware of Mota's conduct in filing the near miss reports. Respondent argues however that the filing of such report was not protected activity and that, even if it was, the Respondent exhibited no hostility toward such activity and, in fact, encouraged its employees to file near miss reports, even rewarding them for doing so. I find that the filing of a near
45 miss report which reports a safety issue is protected concerted activity for the reasons advanced by the General Counsel. Although I had my doubts whether the General Counsel had proved animus toward employees who file such reports, I have ultimately concluded that, at least with respect to Mota, the Respondent was hostile to such activity. What has convinced me of this is the memos prepared by Andrews recommending Mota's termination that list, as reasons, his filing of the near
50 miss reports. Regardless of how the Respondent treated other employees who filed these reports, it admittedly did not like the way Mota submitted them, which the Respondent supervisors perceived

to be an attack on another employee. I find that General Counsel has proved that Mota's filing of the near miss reports was a motivating factor in the decision to terminate him.

I also find that Mota's perceived support for the Union was another motivating factor in his discharge. Andrews knew when he hired Mota that he was aligned with Hils, who had referred Mota for employment. After he began working at the Bristol facility, Mota continued to demonstrate his allegiance to the Union when, during the Respondent's investigation of the March 23 accident, he asked if the union steward could review the statement prepared for him by Gerrard and then requested a copy. The Respondent's animus toward this request was exhibited by Andrews questioning of Mota's motives for seeking a copy of the statement he had been asked to sign. When Hils, the steward who had already antagonized the Respondent by his efforts to protect employees during the investigation, filed two grievances on Mota's behalf, the Respondent clearly had knowledge that Mota was a union supporter. This is evidenced by the opinions expressed by the Respondent's supervisors to Andrews that Mota was likely to be a troublemaker and that it would be best to get rid of him before it was too late, i.e. before he finished his probationary period.

Having found that the General Counsel met his initial burden of showing that protected activity was a motivating factor in Mota's discharge, I must now consider whether the Respondent has offered evidence sufficient to establish that it would have discharged Mota when it did even absent his protected activity and union support. While it is true that the Respondent did not need to have any reason for terminating a probationary employee like Mota, here the Respondent has come forward with a litany of reasons which seemed to grow as the trial progressed. The testimony of Andrews, Gerrard and Robertson, attempting to show that Mota was not satisfactorily completing his probation, was not credible. As noted above, the testimony at trial was not consistent with the written memos prepared at the time the discharge was being considered. Moreover, I note that all of these witnesses acknowledged never raising any of these issues with Mota. This is a clear violation of the Respondent's own policy for dealing with probationary employees, as evidenced by the form Mota was asked to sign when hired. Rather than provide feedback to a probationary employee so he could try to correct any perceived problems and successfully complete his probation, the Respondent essentially hid its objections from him until it was too late to save his job.

Based on the above and the record as a whole, I find that Respondent violated Section 8(a)(1) and (3) by discharging Mota on April 29 because he had raised safety complaints, invoked his contractual rights and demonstrated that he would be a union supporter.

Conclusions of Law

1. By threatening employees with unspecified reprisals because they engaged in union and other protected concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Luis Mota on April 29, 2009 because he engaged in protected concerted activities and supported the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and

other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁷ The Respondent shall also be ordered to post a Notice to Employees.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

10 The Respondent, Covanta Bristol, Inc., Bristol, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Threatening employees with unspecified reprisals because they engaged in union and other protected concerted activities.

(b) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities or for supporting Local 30, International Union of Operating
20 Engineers or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

25 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Luis Mota full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
30

(b) Make Mota whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

35 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Mota in writing that this has been done and that the discharge will not be used against him in any way.

40 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards,

⁷ In his brief, General Counsel has requested, as part of the remedy, that interest be compounded on a quarterly basis. While I find the arguments advanced in favor of this persuasive, I shall defer to the Board to make such a change in the Board's standard remedial orders. See *Glen Rock Ham*, 352 NLRB 516, fn. 1 (2008).
45

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed
50 waived for all purposes.

personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bristol, Connecticut, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 16, 2010.

Michael A. Marcionese
Administrative Law Judge

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT threaten you with unspecified reprisals because you engage in union and other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities or for supporting Local 30, International Union of Operating Engineers or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Luis Mota full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Mota whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Mota's unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

COVANTA BRISTOL, INC.

(Employer)

Dated _____

By

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

450 Main Street, 4th Floor
Hartford, Connecticut 06103
Hours: 8:30 a.m. to 5 p.m.
860-240-3522.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3528.